United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2390

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ZACHARY MORGAN,

Plaintiff-Appellant,

-against-

ERNEST MONTANYE, Warden of Attica State Prison Correction Officer Steggs, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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Statement

This is an appeal from an order dated June 10, 1974 of the United States District Court for the Western District of New York (Curtin, J.) dismissing a complaint initiated under the Civil Rights Act.

Question Presented

Did appellant set forth facts in the complaint sufficient for showing that appellees or any of them conspired to deprive or deprived him of his rights relating to the receipt of legal correspondence?

Prior Proceedings*

The complaint dated July 31, 1973 alleged that on July 14, 1973 appellant received from his counsel a letter in regard to a pending appeal. He claimed that the letter was opened and censored in his absence.** (R1 p. 3) Further, he alleged that on July 23, 1973 he received a copy of an appeals brief. He claimed that a few pages were missing (R1 p.3) and that defendants conspired to destroy or confiscate the pages. (R1 p. 4).

The District Court considered the complaint as a request for relief under the Civil Rights Act and directed that answering

* The references are to the number of the document and the page number of the document contained in the original record.
** Apparently plaintiff based the allegation as to censorship on his observation that the letter had the so-called "censorship stamp" on it. However the phrase is confusing. The stamp referred to signifies only that the letter was not treated as special correspondence from an attorney. There is no claim that any of its contents were deleted.

papers be served on appellant. The affidavit of Correction Officer Stephen Seeley sworn to October 4, 1973 indicates that mail enclosed within an envelope bearing no indication that the correspondence is from an attorney is opened in the Correspondence Department. On July 14, 1973 Seeley was assigned to work in there. He was unable to deliver mail personally because of a broken ankle. Moreover he had no recollection of the incident. The affidavit of Correction Officer Harold Steggs states that appellant's legal mail was opened in the presence of appellant on July 23, 1973, examined and given to him. Any missing papers would have been missing when the brief was mailed from the place of origin.

In a rebuttal affidavit dated October 23, 1973 appellant denied Stegg's allegation that he received the brief in accordance with the rules governing legal mail. (R4 p.3) Further, he asserted that he had proof of his claims. The District Court directed appellant to submit an affidavit setting forth the facts in support of these claims and any other material which he wished to bring to the court's attention.

In an affidavit dated January 24, 1974 appellant acknowledged that he could agree with Correction Officer Seeley as to the possibility of one letter [the letter received on July 14, 1973] being inadvertently mishandled (R6 p. 1) but he denied

that the same was true of two other letters received after the date of the complaint namely one on August 9, 1973 (R6 pp. 1-2) [plaintiff's Ex. B attached to his affidavit] and the other on September 4, 1973 [plaintiff's Ex C]. He claimed that he (appellant) had subsequently honored appellees' request to show proof that prior correspondence was received from an attorney. Further, appellant alleged that one of the appellees removed pages from the brief but he did not know which one (R6 p. 3).*

ARGUMENT

APPELLANT FAILED TO SET FORTH FACTS SUFFICIENT FOR SHOWING THAT APPELLEES OR ANY OF THEM CONSPIRED TO DEPRIVE OR DEPRIVED HIM OF HIS RIGHTS RELATING TO THE RECEIPT OF LEGAL CORRESPONDENCE AND THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT.

Appellant contends that he was entitled to summary judgment or a trial. There is no merit in the contention. He failed to state a claim upon which relief could be granted, and the District Court correctly dismissed the complaint.

* Appellant apparently indicates that he received the alleged missing pages shortly after he drew up the complaint. He states that his attorney under a covering letter dated August 7, 1973 "enclosed the missing pages". (R6 p. 3)

Appellant himself acknowledged that the letter received on July 14, 1973 could have been inadvertently mishandled (R6 p. 1). [Further, Correction Officer Seeley's affidavit indicates that he could not recall the event. Moreover, he had a broken leg and would have been unable to open and examine the letter in appellant's presence. Also, the envelope was marked with a return address from St. John's University School of Law. As the District Judge noted it was possible for appellees to be confused as to whether it was legal correspondence.]

Appellant claimed that subsequent to the receipt of a letter on July 14, 1973 he honored appellees' request to show proof that it came from an attorney. He denied that letters allegedly received from his attorney on August 9, 1973 and on September 4, 1973 could have been inadvertently mishandled. These allegations were raised after appellees had served their answering papers. No motion was made for permission to serve a supplemental complaint setting forth these events, nor did the court deem it necessary to require appellees to respond to these claims. They were not properly before the court except insofar as they related to the issue as to whether the opening of the letter received on July 14 was inadvertent. As, shown above, even appellant acknowledged the possibility.

In any case, even if appellant were permitted to introduce separate claims concerning the subsequent letters and even if he could show that they were intentionally opened and read outside of his presence the complaint would still have to be dismissed for failure to state a claim upon which relief could be granted. As is was stated in Sostre v. McGinnis, 442 F 2d 178, 201 (2d Cir. 1971); cert denied sub. nom. Oswald v. Sostre, 405 U.S. 978 (1972).

> "...we necessarily rule that prison officials may open and read all outgoing and incoming correspondence to and from prisoners".

Correction Officer Harold Steggs asserts in his affidavit that appellant's legal mail was opened in his presence on July 23, 1973 and appellant in a rebuttal affidavit denied the assertion. Taking appellant's allegation as true and assuming that his legal mail was opened on July 23, 1973 outside of his presence, and assuming further that a few pages from the brief were missing when he received it, these facts alone would not justify a finding that appellees conspired to remove or that any of them removed those pages. Appellant indicates that the day after he received the brief and in response to his complaint Steggs asked for proof that it came from a licensed attorney

rather than merely from a law school (R4 p. 3; Ex 1-A). At most, appellant's allegations amount to a contention that his mail may have been opened on July 23, 1973 outside of his presence on the assumption that it was not legal correspondence. Further, the request for proof as to the origin of the mail tends to show a good faith attempt to conform to the Department's rules. Moreover, the event of the alleged missing pages appears to be an isolated incident and there is nothing in the pleadings and affidavits to indicate that anyone intended to abuse him. In sum appellant failed to set forth facts sufficient for showing that appellees or any of them participated in a scheme to deprive or deprived him of his rights. See Reilly v. Doyle, 483 F. 2d 123, 128-129 (2d Cir. 1973); Powell v. Jarvis, 460 F 2d 551, 553 (2d Cir. 1972); Powell v. Workmen's Compensation Bd of State of N.Y., 327 F 2d 131, 137 (2d Cir. 1964); Johnson v. Glick, 481 F 2d 1028, 1034 (2d Cir. 1973).

In view of the foregoing absence of merit, appellant contends that the Sostre ruling must be overruled. There is however no basis for such contention. The Constitution does not require it. Indeed, under the Department's own rules mail from attorneys may not be read but merely opened and examined in the inmate's presence to insure the absence of contraband (Appendix p.9); Goodwin v. Oswald, 462 F 2d 1237, 1245 (2d Cir. 1972);

Wilkinson v. Skinner, 462 F. 2d 670, 672 (2d Cir. 1972); Wright v. McMann, 460 F 2d 126, 132 (2d Cir. 1972). The State has imposed upon itself a greater restriction than is mandated. As it was stated in Wolff v. McDonnell, ____ U.S. ____ 41 L. Ed 2d 935, 963 (1974):

> "...we think the State, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, has done all, and perhaps even more, than the Constitution requires."

CONCLUSION

THE ORDER SHOULD IN ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
January 9, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellees

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First Assistant Attorney General

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of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROSALIN FANN , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendant-Appellees herein. On the 10th day of January , 1975 , she served the annexed upon the following named person :

GRETCHEN WHITE OBERMAN
Counsel for Plaintiff-Appellant
277 Broadway
New York, New York

Attorney in the within entitled ~~ex~~ action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Rosalin Fann
ROSALIN FANN

Sworn to before me this
10th day of January , 1975

Burton Herman
Assistant Attorney General
of the State of New York